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No. 03-701

In the Supreme Court of the United States

JAMES S. DEATON, ET AL.
PETITIONERS,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE BUILDING INDUSTRY LEGAL DEFENSE FOUNDATION, THE CALIFORNIA BUILDING INDUSTRY ASSOCIATION, AND THE CITIES OF SIGNAL HILL, DOWNEY, IRWINDALE, MONTEBELLO, POMONA, SANTA FE SPRINGS AND VERNON IN SUPPORT OF PETITIONERS JAMES S. DEATON, ET AL.

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QUESTION PRESENTED

Whether a roadside ditch fronting a privately owned piece of property is a "waters of the United States," such that the landowner violated the federal Clean Water Act by not obtaining a permit from the U.S. Army Corps of Engineers before placing dirt in a wetland adjacent to the ditch.

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INTEREST OF THE *AMICI CURIAE*

Amici Curiae the California cities of Downey, Irwindale, Montebello, Pomona, Santa Fe Springs, Signal Hills, and Vernon, the Building Industry Legal Defense Foundation ("BILD") and the California Building Industry Association ("CBIA") advocate in rulemaking, policy-making and law-making venues to ensure that the federal Clean Water Act ("CWA") is interpreted and applied in a manner that respects the outer bounds of authority vested by Congress in the administering agencies.[1] The *Amici Curiae* cities have a combined population of over 300,000 people. Each city is regulated under a CWA permit for urban runoff, where jurisdictional issues as to the boundary between the storm drain and waters of the United States are of paramount importance. The membership of BILD and CBIA includes almost all the major homebuilders in America, companies that build homes on raw land throughout the country, in so doing frequently encountering agency interpretation of the jurisdictional reach of CWA. Most large homebuilding projects in America are subject to CWA permits for runoff to waters of the United States. The location of federal waters is of critical importance to CWA permit holders like the *Amici Curiae* and their members because their compliance obligations are in specific reference to them.

The agencies progressively have attempted to expand the reach of federal waters, to the point that "waters of the United States" can be found in some jurisdictions to include, by virtue of agency fiat, ephemeral drainages, drainage ruts,

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1 *Amici Curiae* have received the parties' written consent to file this brief in support of petitioners. Letters of consent have been filed with the Court. Counsel for *Amicus Curiae* have authored this brief, which was not written in whole or in part by counsel for a party. No one other than certain *Amici Curiae* made a monetary contribution to the preparation of this brief.

storm drain pipes, and even the curb, street and gutter. This upland extension of claimed federal jurisdiction over waters has eviscerated the distinction between the national interest, on the one hand, and the local interest, on the other, subjecting municipalities and homebuilders to federal land use planning—a result expressly rejected by Congress, and one that contravenes principles of federalism. The experience in this regard has been acute in California.

I. SPECIFIC EXAMPLES OF REGULATORY EXCESS IN CALIFORNIA.

U.S. EPA has "delegated" authority under CWA to the State of California, but retains its own authority to act here and often does. The State of California amended its Water Code in 1972 in part to "avoid direct regulation by the federal government" under CWA.[2] However, that legislative purpose has never been fully realized. As the *Amici Curiae* often hear from state water quality regulators, their "hands are tied" by U.S. EPA directives.

The following examples illustrate how water quality regulators in California improperly asserting jurisdiction under CWA, resulting in invasive regulation that is doing little to improve the water quality of truly federal waters.

A. The Automatic Extrapolation Of Beneficial Uses For Actual Open Waters To Upstream Drainages, Regardless Of Their Actual Uses.

The upland extension of waters of the United States creates bizarre results when coupled with the so-called "Tributary Rule," contained in many of the U.S. EPA-approved water quality control plans for the State of California.[3] Under the Tributary Rule, the agencies

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[2] Cal. Water Code § 13320(c), Stats. 1972, c. 1256, p. 2485, § 1, eff. Dec. 19, 1972.

[3] California is split into nine regions, each with a Regional Water Quality Control Board, and each with a U.S. EPA-approved water quality

improperly assume that storm drains and other upstream drainage features automatically have the same water quality standards as the receiving waters into which they drain. For example, the Tributary Rule in the L.A. Basin Plan states as follows:

> Those waters not specifically listed . . . are designated with the same beneficial uses as the streams, lakes, or reservoirs to which they are tributary. This is commonly referred to as the "tributary rule."[4]

The Tributary Rule is being used to regulate municipalities and homebuilders, as if they were discharging to waters that constitute a public water supply, or a public beach, or a habitat for fisheries, when the reality is to the contrary.

For example, on the basis of the Tributary Rule, Vacaville, a small city in the Central Valley of California, is being held to a CWA permit for its wastewater plant predicated on the assumption that the beneficial uses for public water supplies and cold water fisheries are relevant to the ditch to which it discharges (a hydrologically modified "receiving water" dominated by wastewater effluent and agricultural tailwater) when, in fact, the Regional Board concluded that such uses did not exist. While the wastewater plant is located many miles upstream of the Sacramento-San Joaquin River Delta, on the basis of the Tributary Rule, the agency applied the Delta's beneficial uses to the plant's discharges.[5]

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control plan, or Basin Plan, containing local water quality standards for that region.

4 Water Quality Control Plan, Los Angeles Region, at 2-4 (June 13, 1994), *available at* http://www.swrcb.ca.gov/rwqcb4/html/meetings/tmdl/Basin_plan/basin_plan_doc.html ("L.A. Basin Plan").

5 Order WQO 2002-15, Cal. State Water Res. Control Bd., at 29-30 (Oct. 3, 2002), *available at* http://www.swrcb.ca.gov/resdec/wqorders/2002/wqolog.html.

The Regional Board had tried vehemently to modify the Tributary Rule in an attempt to "remove a known falsehood from the Basin Plan."[6] As noted by the Regional Board, "[i]n the real world of the Central Valley's watersheds, exceptions to the tributary footnote [*i.e.*, rule] abound," the "fundamental premise" of which is "false."[7] When U.S. EPA disapproved of the Regional Board's attempt to modify the Tributary Rule,[8] the Regional Board explained that the Tributary Rule can lead to "inconceivable" results that "just do not make sense,"[9] commenting: "USEPA staff have invoked the tributary footnote as the appropriate principle governing the selection of beneficial uses, even in the face of conflicting facts. . . . USEPA says there is no need for fact findings, the tributary footnote tells us all we need to know."[10] Similarly, in 2001, another Regional Board (based on the Tributary Rule) applied designated beneficial uses for Newport Bay in Orange County to a vertical-walled, fenced-off concrete box culvert draining a downtown area. Thus, found the Regional Board, drinking water and swimming standards must be met in the culvert. Since the standards were not met within the culvert, the Regional Board recommended that the culvert be listed as not meeting water quality standards under CWA's Section 303(d) program.

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6 Staff Report Re: Amendment of the Water Quality Control Plan for Sacramento River Basin, Sacramento-San Joaquin Delta Basin, and the San Joaquin River Basin, Central Valley Regional Board (Oct. 11, 1994) ("Staff Report").

7 Staff Report.

8 Letter from Alexis Strauss to Edward Anton re: Disapproval of Certain Portions of Central Valley Basin Plan (May 26, 2000) (letters available upon request of the Court).

9 Letter from Jerrold Burns to Kathy Goforth re: Response to US EPA Actions on Central Valley Basin Plan Amendments (Aug. 31, 2000).

10 *See* Staff Report.

Amici Curiae supported a study by Drs. Susan Paulsen and John List of water quality concerns in the Los Angeles region, including the Tributary Rule. Drs. Paulsen and List, nationally recognized water quality experts, concluded in part:

> The application of water quality objectives to all tributary streams via the tributary rule . . . could require the collection and treatment of storm flows, urban runoff, and other nonpoint source sources on a very small, localized scale. This would result in impractical, costly and inefficient methods for improving water quality in the larger receiving water bodies that the Clean Water Act . . . primarily intended to protect. The tributary rule should be revised to reasonably protect designated beneficial uses without extending, at enormous potential expense, regulatory requirements to each and every upstream drainage facility. . . . [11]

B. Vertical-Walled Box Culvert Being Regulated As Waters Of The United States That Are Swimmable.

A vertical-walled, concrete-lined box culvert that runs from downtown Los Angeles to Culver City, approximately three miles, is designated a "waters of the United States" by the L.A. Regional Board. The culvert was assigned a body-contact recreational use called "REC-1" which includes swimming; REC-1 is defined as follows:

> Uses of water for recreational activities involving body contact with water, where ingestion of water is reasonably possible. These uses include, but are not

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[11] Susan C. Paulsen & E. John List, *A Review of the Los Angeles Basin Plan Administrative Record*, at 56-57 (Feb. 2003), *available at* http://www.citiessavejobs.com/dynamic/downloads/individual_download_file_link_english_181.pdf.

limited to, swimming, wading, waterskiing, skin and scuba diving, surfing, white water activities, fishing, or use of natural hot springs.[12]

Once a culvert is classified as a "waters of the United States," the agencies will not relent absent a "structured scientific process" called a Use Attainability Analysis ("UAA"), [13] a process that has had little value in practice. For example, on June 5, 2003, the L.A. Regional Board voted to maintain REC-1 as a designated beneficial use for the culvert. Regional Board staff had conducted a UAA and recommended removal of the swimming designation because there is no access to the culvert and because of the extreme danger in entering the culvert when it contains flood water. The Board rejected the staff's common sense and precautionary recommendation and upheld the swimming designation.

C. Entire Public Storm Drain System Declared "Waters of the United States."

The San Diego Regional Board, ostensibly acting under CWA, issued a permit in 2001 for the public storm drains in San Diego County. The permit defined "waters of the United States" such that: "a Municipal Separate Storm Sewer System (MS4) is always considered a Waters of the United States."[14] The permit defined MS4s to include all "roads with drainage systems, municipal streets, catch basins, curbs, gutters, ditches, natural drainage features or channels, modified natural channels, man-made channels, or

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12 L.A. Basin Plan at 2-2. *See supra* n.4.

13 40 C.F.R. § 131.10.

14 San Diego Regional Bd. Order No. 2001-01, at D-8 (Feb. 21, 2001), *available at* http://www.swrcb.ca.gov/~rwqcb9/programs/stormwater/sd%20permit/Order%20No.%202001-01%20Final%20with%20attachmentss.pdf.

storm drains."[15] Thus, under this agency's view, the entire municipal storm drain starting at the curb and gutter is "waters of the United States."[16]

Under this approach, all "point sources" that "discharge" to our urban and suburban streets arguably require CWA permits. Are driveways and sidewalks "point sources" bordering "waters of the United States"? To say that the agency's definition brings CWA to the front door is not hyperbole.

Environmental groups are heralding the San Diego permit as a precedent for the nation to follow. An environmental group called the San Diego BayKeeper was paraphrased in the San Diego Tribune as proclaiming that a trial court decision upholding the permit's definition of "waters of the United States" "clears the way for San Diego's storm-water permit to become a national model."[17]

D. Agencies Specify Upland Best Management Practices ("BMPs") And Invade The Land Use Authorities Of Local Government.

Another consequence of the inland extension of CWA jurisdiction is that it is leading water quality regulators to micro-manage local government practices to protect downstream receiving waters. For example, the San Diego Regional Board directs BMPs to be placed as close as possible to where the raindrop first hits the ground: "Use small collection strategies located at, or as close as possible to, the source (*i.e.*, the point where water initially meets the ground)...."[18]

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15 Order No. 2001-01, at D-4.

16 Order No. 2001-01, at D-4.

17 Terry Rodgers, *Water Board Wins Key Urban Run-off Case*, San Diego Union Tribune, Feb. 14, 2003, at B-1.

18 *See* Order No. 2001-01 at 14.

The San Diego Regional Board's permit requires BMPs for a plethora of urban and suburban land uses, requiring mandatory BMPs for residential activities such as home gardening, automobile washing and parking.[19] The San Diego permit requires cities to prohibit their residents from common activities, including hosing off driveways and patios, and washing their cars unless you can catch the rinse water before it enters the catch basin.[20]

These intrusions are affecting quality of life. For example, inspectors enforcing a similar CWA permit for the L.A. region ordered a downtown L.A. landlord who has helped to rehabilitate an area near skid row to stop washing the sidewalk in front of his hotel.[21] According to the L.A. Times, the sidewalk cleaner was admonished to, "[d]rop that hose." The owner said he would "cease and desist from maintaining my properties as any human being would have a right to expect," if the city agreed to clean the sidewalks of the previous night's accumulation of, "urine, human waste, vomit, alcohol, cardboard, clothing, hypodermic needles, crack pipes and bullet casings." Recognizing the landlord's "Catch-22 situation," city officials stressed that their hands were tied by the CWA.

II. THE ECONOMIC CONSEQUENCES OF CURRENT REGULATIONS ARE POTENTIALLY ONEROUS.

A study carried out by engineering experts at the University of Southern California School of Engineering analyzed the stormwater regulations in the Los Angeles area, taking them at "face value," and estimating the

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19 *See* Order No. 2001-01 at 33.

20 San Order No. 2001-01 §§ D.1.b.5, D.1.b.8.

21 *See* Bob Pool, *Dispute Taints Sidewalk Cleanup; Downtown: Officials Say Loft Developer Must Stop Washing Garbage And Human Waste From In Front Of His Building*, L.A. Times, Oct. 8, 2002.

economic consequences of compliance. The following is from the executive summary of the study's findings:

> This study . . . of the potential costs required to meet new and emerging stormwater regulations in the Los Angeles area . . . confirms that advanced treatment of storm flows will likely be required . . . . Such treatment will be extremely costly and will generate significantly negative economic consequences for our region. The principal study case, which contemplates 65 treatment plants to accommodate regional stormwater requirements, shows that:
>
> - The capital costs required to build new collection and treatment facilities range from $43.7 billion to treat flows from about 70% of the historic[al] average annual storm events to $283.9 billion for 97% of the expected storm events.
> - The 20 year present value (cost) of the net economic impacts to each L.A. County household for these required stormwater facilities ranges from about $6,670 to treat the smallest 70% of storms to $41,760 to treat 97% of the expected annual storm events.[22]

These projected costs underscore the potential impact to *Amici Curiae*, and their residents and members, and the need for the Court to halt the extra-jurisdictional action of various agencies under color of CWA.

SUMMARY OF ARGUMENT

CWA defines federal waters in a geographical sense, extending that concept broadly to all truly open bodies of

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22 Peter R. Gordon, et al., *An Economic Impact Evaluation of Proposed Stormwater Treatment for Los Angeles County*, at 1 (Nov. 2002), *available at* http://www.citiessavejobs.com/dynamic/downloads/individual_download_file_link_english_175.pdf.

water that may be regulated under the Commerce Clause, and their adjacent wetlands. Although broad, such jurisdiction does not extend to things without common hydrologic features, such as roadside ditches, drainage ruts, storm drain pipes and culverts, city streets, or the curb and gutter. To hold otherwise would frustrate clear congressional intent and violate principles of federalism woven into CWA.

ARGUMENT

In the case at hand, requiring the Deatons to obtain a federal permit to develop their land-locked property constitutes *ultra vires* agency action, as it improperly attempts to extend CWA jurisdiction beyond congressionally imposed limits and violates the federal-state balance that Congress carefully wove into CWA.

I. CWA JURISDICTION IS LIMITED TO ACTUAL WATER BODIES AND THEIR ADJACENT WETLANDS.

A. In 1972, Congress Expanded The Waters Subject To Federal Water Quality Regulation To Include Open Bodies Of Water Not Navigable In Fact.

In 1972, Congress clearly extended agency jurisdiction under federal water quality law beyond waters that were navigable in fact, rejecting the limited view of navigability of the *Daniel Ball* case.[23] Just as clearly, Congress in 1972 did not extend unbridled discretion to the agencies to define for themselves just how far beyond navigable-in-fact waters the agencies may extend CWA permit programs. Rather, Congress defined jurisdictional waters with reference to precedent involving various rivers across the country.

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23 *The Daniel Ball*, 77 U.S. 557, 563 (1870) ("Those rivers must be regarded as public navigable rivers in law which are navigable in fact.").

Representative Dingell, one of the active supporters of the 1972 CWA, stated in pertinent part:

> [T]he conference bill defines the term "navigable waters" broadly for water quality purposes. It means all 'the waters of the United States' in a geographical sense. It does not mean "navigable waters of the United States" in the technical sense as we sometimes see in some laws.
>
> The new and broader definition is in line with more recent judicial opinions which have substantially expanded that limited view of navigability—derived from the Daniel Ball case (77 U.S. 557, 563)—to include waterways which would be "susceptible of being used *** with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, et cetera . . . .[24]

None of the "more recent judicial opinions" with respect to which the 1972 amendments were "in line" extended the concept of navigable waters to things like roadside ditches, or anything other than a truly open water body. Representative Dingell specifically cited to a series of cases that found navigable in law various river reaches including: portions of the Colorado, Green and Grand Rivers in the western United States;[25] an 111-mile stretch of the New River running from Virginia into West Virginia, throughout which there was an "abundance of water;"[26] the Wisconsin River despite channel sections that were "broken and

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24 Remarks of Rep. Dingell, 118 Cong. Rec. 33756 (Oct. 4, 1972).

25 *United States v. Utah*, 283 U.S. 64 (1931).

26 *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377, 410 (1940).

divided, offering almost insurmountable obstacles;"[27] the Snake Tail Rapids on the East Fork of the Chippewa River in Wisconsin where fast water and protruding rocks made passage "very difficult;"[28] the Namekagon River in Wisconsin, one of the best freshwater bass angling streams in the country;[29] the Rio Grande River on the basis of the potential to restore actual navigable capacity;[30] the Genesee River above Rochester, New York, but not necessarily a turbulent stretch of river 65 miles from the river's mouth;[31] and the Desplaines River in Illinois despite the fact that it "fell into disuse . . . for a hundred years."[32]

In some of the cases to which the legislative history refers, the courts struggled over determining whether reaches of certain rivers were not federal waters because of navigational impediments. Thus, in cases decided before 1972 a river for purposes of federal jurisdiction could be broken up into non-contiguous segments—a rather arbitrary means for the federal government to establish domain. It was this "technical sense" of navigability which allowed rivers to be piecemealed into navigable and non-navigable segments, based on various impediments to actual navigation, that Congress rejected in 1972. The

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27 *Wis. Pub. Serv. Corp. v. Fed. Power Comm'n*, 147 F.2d 743, 745 (7th Cir. 1945).

28 *Wisconsin v. Fed. Power Comm'n*, 214 F.2d 334, 335 (7th Cir. 1954).

29 *Namekagon Hydro Co. v. Fed. Power Comm'n*, 216 F.2d 509, 512 (7th Cir. 1954).

30 *Puente de Reynoso v. City of McAllen*, 357 F.2d 43, 50-51 (5th Cir. 1966).

31 *Rochester Gas & Elec. Corp. v. Fed. Power Comm'n*, 344 F.2d 594, 597, 599 (2d Cir. 1965).

32 *Economy Light & Power Co. v. United States*, 256 U.S. 113, 123-24 (1921).

"geographical sense" adopted by Congress in 1972 swept rivers from start to finish into the ambit of jurisdiction thereby, "encompass[ing] all water bodies, including main streams and their tributaries, for water quality purposes."[33]

Nowhere in CWA itself or the 1972 legislative history does Congress ascribe federal water status to things other than truly open bodies of water—the kinds of waters with banks, shores, and other hydrologic attributes. The extension of federal water status to roadside ditches, drainage ruts, storm drains, curbs and gutters is the creature of unlawful agency action.

B. Congress' Acquiescence In Agency Jurisdiction Over Adjacent Wetlands Defines The Limit Of Permitting Authority Over Things That Are Not Water Bodies.

In 2001 the Court addressed various CWA legislative and rulemaking activity from enactment in 1972 through 1977.[34] Considering legislative proposals to change the definition of "navigable waters" so as to express it in specific terms, the Court commented, "debate on the [legislative] proposals to narrow the definition of navigable waters centered largely on the issue of wetlands preservation."[35] The Court concluded: "Beyond Congress' desire to regulate wetlands adjacent to 'navigable waters,' respondents point us to no persuasive evidence that the House bill was proposed in response to the Corps' claim of jurisdiction over

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[33] Remarks of Rep. Dingell, 118 Cong. Rec. 33756 (1972). *Amici Curiae* are not implying that all water bodies are jurisdictional. Rather, the class of waters regulated as "waters of the United States" under the CWA is limited to actual water bodies and water courses, that also satisfy appropriate elements of the Commerce Clause.

[34] *Solid Waste Agency of N. Cook County v. United States Army Corps of Eng'rs*, 531 U.S. 159, 174 (2001) ("*SWANCC*").

[35] *SWANCC*, 531 U.S. at 170 (quoting *United States v. Riverside Bayview Homes*, 474 U.S. 121, 136 (1985)).

nonnavigable, isolated, intrastate waters or that its failure indicated congressional acquiescence to such jurisdiction."[36]

Thus, the Court's holding in *Riverside Bayview Homes* that jurisdiction under CWA extends to adjacent wetlands clearly is not the "open door" through which jurisdiction over things other than such wetlands can pass.

II. CWA RESPECTS THE DISTINCTION BETWEEN THE NATIONAL AND THE LOCAL, A RESPECT THAT IS EVISCERATED WHEN AGENCIES REGULATE DRAINAGE RUTS AND CITY STREETS AS IF THEY WERE FEDERAL WATERS.

A. The CWA Provisions Reflect Congressional Sensitivity To Potentially Intrusive Regulation Under Federal Law.

The goals and policies of CWA contain a subsection entitled, "Congressional recognition, preservation, and protection of primary responsibilities and rights of States," which states in pertinent part:

> It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .[37]

CWA is consistent with Congress' stated desire to respect the "primary responsibilities and rights" of state government over land use and water resource matters. Congress took a programmatic approach to the potential water quality impacts of land use and water supply development and management—rather than subjecting

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36 *SWANCC*, 531 U.S. at 170-71.

37 33 U.S.C. § 1251(b).

them to command-and-control permitting under CWA Sections 402 (permits for discharges of pollutants) and 404 (permits for dredge and fill), 33 U.S.C. §§ 1342, 1344.

For example, CWA contains a program through which states develop "areawide waste treatment management plans" to address "substantial water quality control problems" related to "urban-industrial concentrations or other factors."[38] The purpose of these so-called "208 Plans" is to address various water quality issues outside of the federal permitting schemes of Sections 402 and 404. 208 Plans encompass not just urban and industrial sources, but also agricultural, silvicultural, mining, construction, and other potential areawide, nonpoint sources. [39]

CWA Section 208(f) provided grants to the states to develop and operate the 208 Plans.[40] These grants are consistent with the congressional purpose of "encouraging and facilitating the development and implementation" of 208 Plans[41]—as opposed to forcing such local pollution through the eye of a federal regulatory needle.

In 1987, Congress added Section 319, "Nonpoint source management programs," in so doing affirming its policy choice of respecting state authority by dealing with pollution upstream of federal waters programmatically—rather than through command-and-control permitting.[42] Although nonpoint source runoff ("NPS") is not defined in CWA, it is discussed in the legislative history, as including runoff from diffuse sources such as urban areas and

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38 33 U.S.C. § 1288(a)(2), CWA § 208(a)(2).

39 33 U.S.C. § 1288(b).

40 33 U.S.C. § 1288(f).

41 33 U.S.C. § 1288(a).

42 33 U.S.C. § 1329.

farmland,[43] such as city streets, parking lots, lawns, residential areas and construction sites.[44]

NPS runoff is not regulated via federal permits. Rather, Section 319(a)(1) states in pertinent part:

> the Governor of each State shall . . . prepare . . . a report which . . . (C) describes the process . . . for identifying best management practices [BMPs] and measures to control each category and subcategory of nonpoint sources and, where appropriate, particular nonpoint sources identified under subparagraph (B) and to reduce, to the maximum extent practicable, the level of pollution resulting from such category, subcategory, or source . . . .[45]

The Section 319 BMPs "are intended to be the primary water quality improvement and water quality compliance mechanism" for NPS.[46] Thus, the implementation of practicable BMPs is the policy approach of Section 319 to reduce NPS pollution. This approach is fundamentally different from the Section 402 and 404 permitting schemes, and reflects congressional intent to distinguish local NPS issues from the permitting programs for federal waters.

CWA's extensive planning provisions for potential pollution from various kinds of land use become superfluous if federal waters are defined so broadly that they encompass the erosion rut, the curb, the street and gutter. Under such

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43 *See, e.g.*, Remarks of Sen. Chafee, 133 Cong. Rec. 1582 (1987) ("Nonpoint pollution is pollution that does not come out of a specific pipe. It is pollution that comes from runoff—from farmlands, for example, or from parking lots in cities.").

44 *See, e.g.*, Remarks of Sen. Durenberger, 133 Cong. Rec. 1276 (1987) (NPS includes sources such as "residential areas, streets, roads, highways, other developed areas.").

45 33 U.S.C. § 1329(a)(1).

46 Remarks of Sen. Strangeland, 133 Cong. Rec. 991 (1987).

a definitional scheme, these land uses would discharge routinely into "federal" waters, triggering the permitting provisions of Sections 402 and 404. Clearly, this result was not contemplated by Congress, which limited the extent of federal waters so that there would be a sphere within which local government could operate to address water quality through non-regulatory programs.

B. Legislative History Reflects Congress' Intent To Avert Federal Land Use Planning Under CWA.

The legislative history reflects controversy regarding Section 319, the nonpoint source ("NPS") provision, as Republicans were concerned that it constituted federal land use planning, extending the reach of CWA to purely local matters. Senator Mitchell responded to these concerns in no uncertain terms:

> In his statement the other day, the distinguished minority leader referred to the nonpoint provision of this bill as 'Federal land use planning.'
>
> This is a serious charge. It is an erroneous charge.
>
> This bill does not—I repeat does not—provide for Federal intervention in State and local land use planning decisions.
>
> The nonpoint provision gives States the lead role in addressing nonpoint pollution problems. The Federal Government plays a limited, support role.
>
> Further, the bill does not direct States to establish regulatory programs for control of nonpoint sources of pollution. I repeat that the bill does not direct States to establish regulatory programs for control on nonpoint sources of pollution. It specifically refers to a wide range of nonregulatory programs such as education, training, technical assistance, and

> demonstration, while not preventing a State from adopting a regulatory program where needed.[47]

Senator Mitchell concluded emphatically:

> So it is absolutely false, untrue and misleading for anyone to say that this is Federal land use planning.[48]

This legislative history reflects Congress' recognition that the 1972 CWA did not federalize land use planning, as well as Congress' intent that the 1987 amendments did not move federal water quality regulation in that direction. Congress in 1987 evinced its intent to abide by the original goals and policies of the 1972 CWA, to respect the "primary responsibilities" of the states with respect to land use planning.

C. CWA Respects The Principles of Federalism.

The federal-state balance of CWA reflects congressional design based on principles of federalism. As stated by the Court in the *Morrison* decision, "[t]he Constitution requires a distinction between what is truly national and what is truly local."[49] As recognized by the Court in the *SWANCC* and *Hess* decisions, the "regulation of land use" is a "function traditionally performed by local governments."[50] Land use authority is an aspect of the "generalized police power," reserved to the states under the Constitution. As the Court stated in *Morrison*:

> [T]he principle that '[t]he Constitution created a Federal Government of limited powers,' while

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47 Remarks of Sen. Mitchell, 133 Cong. Rec. S1006 (daily ed. Jan. 21, 1987).

48 Remarks of Sen. Mitchell, 133 Cong. Rec. S1006.

49 *United States v. Morrison*, 529 U.S. 598, 617-18 (2000).

50 *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (quoted favorably in *SWANCC*, 531 U.S. at 174).

> reserving a generalized police power to the States, is deeply ingrained in our constitutional history.[51]

By limiting the reach of federal waters and crafting programs to address the impacts of local land uses on water quality, Congress reserved to the states a role in water quality regulation, in accordance with principles of federalism.

D. Federalism Protects The Rights of Individuals From Tyranny, And Cannot Be Dismissed Because State Government Invites Federal Regulation.

The Court may hear from state water quality regulators that they would acquiesce in a construction of jurisdictional waters even broader than the one conceded here. The reason for this is clear: in many states, U.S. EPA has delegated the administration of CWA to state regulators. The power of state regulators to which U.S. EPA has extended delegation is promoted by an expansive interpretation of "waters of the United States."

However much state water quality regulators may want to feed at the trough of federal power, the Constitution should not, and indeed cannot, yield to such assuaging. As the Court in *Lopez* observed, "State sovereignty is not just an end in itself . . . ."[52] The Court explained:

> [T]he Constitution divides authority between federal and state governments for the protection of individuals. . . . [F]ederalism secures to citizens the liberties that derive from the diffusion of sovereign power.[53]

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51 *Morrison*, 529 U.S. at 619 (citations omitted).

52 *United States v. Lopez*, 514 U.S. 549, 576 (1995).

53 *Lopez*, 514 U.S. at 576 (quoting *Coleman v. Thompson*, 501 U.S. 722, 759 (1991) (Blackmun, J., dissenting)).

The federal-state balance of CWA is there for the protection of people, cities and their citizens who have a reasonable expectation, indeed a constitutionally protected one, to have a local sphere free of federal coercion, and landowners who should not be subject to federal intrusion and potential liability when building a home in an upland area. President Reagan understood the importance of this balance when he expressed concern that CWA in 1987 was at risk of becoming overly intrusive. The President stated in pertinent part:

> This new program threatens to become the ultimate whip hand for Federal regulators. . . . [U.S. EPA] will be able to become a major force in local zoning decisions that will determine whether families can do such basic things as build a new home.
>
> ....
>
> Let me repeat—controlling nonpoint source pollution has the potential to touch, in the most intimate ways, practically all of us as citizens, whether farmers, business people, or homeowners.[54]

In response to President Reagan, Senator Mitchell offered assurances[55] that CWA did not constitute federal land use planning. The Deatons and *Amici Curiae* are asking the Court to ensure that the agencies that implement CWA operate within these carefully circumscribed limits set by Congress.

CONCLUSION

In conclusion, *Amici Curiae* respectfully request the Court to accept *certiorari* of the *Deaton* decision, in order to specify the limits of CWA jurisdiction and elucidate how principles of federalism animate this important issue.

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54 133 Cong. Rec. 2392 (1987).

55 *See supra* nn.47, 48.

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